

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE  
AT NASHVILLE

Assigned on Briefs July 17, 2007

**TAMMY HICKS v. STATE OF TENNESSEE**

**Appeal from the Criminal Court for Davidson County**  
**No. 2002-C-1281     Seth Norman, Judge**

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**No. M2006-01297-CCA-R3-PC - Filed December 4, 2007**

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The petitioner, Tammy Hicks, appeals from the Davidson County Criminal Court's denial of her petition for post-conviction relief. The petitioner claims on appeal that she was entitled to relief based upon (1) ineffective assistance of counsel, and (2) an unknowing and involuntary guilty plea, and that the court erred in limiting her cross-examination of counsel on the subject of legal research performed by counsel in the course of representing the petitioner. We hold that the petitioner has not demonstrated error in the trial court's rulings. We affirm the judgment of the trial court.

**Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Criminal Court Affirmed**

JOSEPH M. TIPTON, P.J., delivered the opinion of the court, in which JERRY L. SMITH and JAMES CURWOOD WITT, JR., JJ., joined.

Tammy Wendt Mahew, Nashville, Tennessee, for the appellant Tammy Hicks.

Robert E. Cooper, Jr., Attorney General and Reporter; Sophia S. Lee, Assistant Attorney General; Victor S. Johnson, III, District Attorney General; and Dan Hamm, Assistant District Attorney General, for the appellee, State of Tennessee.

**OPINION**

The petitioner was charged with and pleaded guilty to aggravated child abuse as a result of having given her prescription medication to a ten-month-old child. As part of the plea agreement, she received a fifteen-year sentence to be served as a Violent Offender. She later filed a petition for post-conviction relief. She raised claims that counsel had not adequately investigated her case, consulted with her, advised her of rights, and explained the plea agreement to her. She also alleged that she had not knowingly and voluntarily entered her guilty plea.

At the post-conviction hearing, the petitioner testified that she had an appointed attorney initially and that her ex-husband later hired trial counsel on her behalf. She said she met counsel only a few days before she entered her guilty plea and that trial counsel never came to see her in jail and that they never discussed any possible defenses, the facts of the case, or her right to trial. She

said she felt forced by trial counsel to accept the plea agreement. She said that trial counsel conveyed a fifteen-year settlement offer but that she told counsel she could not serve fifteen years because of her health. She said that at a later court date, trial counsel conveyed a fifteen-year offer and told her that she would only have to serve three to four years in prison. She said she accepted this agreement and did not learn until she was incarcerated that she was not eligible for parole and would have to serve the entire fifteen years. She said that she wrote to trial counsel when she learned of this but that counsel did not respond. She said that at the time of the offense, she was taking several prescription medications – Morphine, Soma, Flexeril, Darvocet, Dyazide, “stomach medicine,” “asthma medicine,” Baklacin, Vistaril, Depakene, and Prozac. She said counsel was not aware of these medications because she never was able to meet with counsel to inform her. She said that she had a mental health evaluation because she was not doing well in jail and that a psychiatrist wanted her evaluated for suicide risk. She said counsel never discussed this evaluation with her. She said she would not have entered the guilty plea had she known that she would have to serve fifteen years in prison.

On cross-examination, the petitioner stated that she had no knowledge of trial counsel having entered an appearance in her case in July 2002 before the petitioner entered her guilty plea in March 2003. She said she did not read the plea agreement paperwork which stated that she would serve a fifteen-year sentence at eighty-five percent service before release eligibility. She said she did not graduate from high school and could read “a little.” She admitted her statement at the plea submission hearing that she was satisfied with the services of counsel. She said she agreed to the sentence as announced at the plea submission hearing because she believed she would only serve three to four years, even though the judge stated that eighty-five percent service was required.

Trial counsel testified that she was hired by the petitioner’s husband in the summer of 2002. She said she had discussed the petitioner’s case with her two or three times on court dates and that she had consulted with the petitioner at the jail. Trial counsel said that the petitioner’s defense was limited because the petitioner had given incriminating statements as well as inconsistent statements. She said that a mental state defense was the only option which seemed viable and that she had the petitioner evaluated. Counsel stated that she reviewed the discovery materials and that there were no factual disputes which required the services of an investigator. She said that when the report of the mental examination was received, she was concerned that the victim might die. She said time was of the essence in entering the guilty plea because the state could have charged the petitioner with murder if the victim died. She said she could not recall what she had told the petitioner about the eighty-five percent service requirement. She said the petitioner received the minimum sentence for the offense to which she pled guilty.

The petitioner’s attorney attempted to cross-examine trial counsel about any legal research trial counsel had performed on the petitioner’s behalf. The state objected, and the trial court sustained the objection to the relevance of this line of questioning.

Three exhibits appear in the record of the hearing. The first is the petition to enter the guilty plea, which reflects that the sentence will be “15 years at 85% to serve.” The second is the notice of appearance, which bears a file stamp dated August 1, 2002. The third is a letter dated November 1, 2002, to the trial court from the director of the Forensic Evaluation Team at Vanderbilt University

Medical Center, which states that the petitioner was evaluated but that the team was unable to determine on an outpatient basis whether the petitioner was competent to stand trial or the status of her mental condition at the time of the offense. The writer recommended that the court consider ordering an inpatient evaluation of the petitioner.

After receiving the evidence, the trial court entered a written order in which it accredited the testimony of trial counsel and the evidence from the transcript of the plea submission hearing over the contrary testimony of the petitioner. The court found that the petitioner had not carried the burden of proving her claims and denied post-conviction relief.

Initially, we note that the petitioner did not file a timely notice of appeal from the trial court's order denying her petition. The petitioner filed a motion in the trial court for extension of time to file a notice of appeal. The petitioner's motion recites as its basis that the trial court's order denying relief was filed on March 29, 2006, but that the order was not received by the petitioner's counsel until April 21, 2006. The motion was filed on May 1, 2006. The trial court entered an order purporting to allow the petitioner until June 12, 2006, to file her notice of appeal. The notice of appeal was filed on June 12.

A notice of appeal shall be filed within thirty days of entry of judgment. Tenn. R. App. P. 4(a). A trial court is without authority to extend the time for filing a notice of appeal. Tenn. R. App. P. 2; Jeffrey Lynn Buckner, No. 03C01-9703-CC-00116, Union County (Tenn. Crim. App. Dec. 17, 1997). However, the notice of appeal document is not jurisdictional in criminal cases and the filing of such document may be waived in the interest of justice. Tenn. R. App. P. 4(a). In the present case, the state has not alleged that it would be prejudiced by waiver of a notice of appeal, and we elect to waive the requirement in the interest of justice.

The burden in a post-conviction proceeding is on the petitioner to prove her grounds for relief by clear and convincing evidence. T.C.A. § 40-30-110(f). On appeal, we are bound by the trial court's findings of fact unless we conclude that the evidence in the record preponderates against those findings. Fields v. State, 40 S.W.3d 450, 456-57 (Tenn. 2001). Because they relate to mixed questions of law and fact, we review the trial court's conclusions as to whether counsel's performance was deficient and whether that deficiency was prejudicial under a de novo standard with no presumption of correctness. Id. at 457. Post-conviction relief may only be given if a conviction or sentence is void or voidable because of a violation of a constitutional right. T.C.A. § 40-30-103.

Under the Sixth Amendment to the United States Constitution, when a claim of ineffective assistance of counsel is made, the burden is on the petitioner to show (1) that counsel's performance was deficient and (2) that the deficiency was prejudicial. Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064 (1984); see Lockhart v. Fretwell, 506 U.S. 364, 368-72, 113 S. Ct. 838, 842-44 (1993). In other words, a showing that counsel's performance falls below a reasonable standard is not enough; rather, the petitioner must also show that but for the substandard performance, "the result of the proceeding would have been different." Strickland, 466 U.S. at 694, 104 S. Ct. at 2068. The Strickland standard has been applied to the right to counsel under article I, section 9 of the Tennessee Constitution. State v. Melson, 772 S.W.2d 417, 419 n.2 (Tenn. 1989). In Baxter v. Rose, 523 S.W.2d 930, 936 (Tenn. 1975), our supreme court decided that attorneys

should be held to a general standard of whether the services rendered were within the range of competence demanded of attorneys in criminal cases. When a petitioner claims that the ineffective assistance of counsel resulted in a guilty plea, the petitioner must prove prejudice by showing that but for counsel's errors, the petitioner would not have entered the plea and would have insisted upon going to trial. Hill v. Lockhart, 474 U.S. 52, 59, 106 S. Ct. 366, 370 (1985). Failure to satisfy either the deficiency or prejudice prong results in the denial of relief. Strickland, 466 U.S. at 697, 104 S. Ct. at 2069.

In the present case, the trial court entered a detailed order in which it accredited the testimony of trial counsel over the conflicting testimony of the petitioner. The court found that trial counsel did not provide deficient performance or that the petitioner was prejudiced by any alleged shortcomings of counsel. On appeal, the petitioner claims that counsel was ineffective in her failure to investigate the case and confer with the petitioner. However, the petitioner has not demonstrated that the evidence preponderates against the trial court's findings of fact relative to the petitioner's ineffective assistance of counsel claim. Those findings support the trial court's legal conclusions that the petitioner did not demonstrate that counsel's performance was deficient or that she was prejudiced by counsel's representation.

We consider next the petitioner's claim that her guilty plea was not entered knowingly and voluntarily. When evaluating the knowing and voluntary nature of a guilty plea, the United States Supreme Court has held that "[t]he standard was and remains whether the plea represents a voluntary and intelligent choice among the alternative courses of action open to the defendant." North Carolina v. Alford, 400 U.S. 25, 31, 91 S. Ct. 160, 164 (1970). The court reviewing the voluntariness of a guilty plea must look to the totality of the circumstances. See State v. Turner, 919 S.W.2d 346, 353 (Tenn. Crim. App. 1995). The circumstances include

the relative intelligence of the defendant; the degree of his familiarity with criminal proceedings; whether he was represented by competent counsel and had the opportunity to confer with counsel about the options available to him; the extent of advice from counsel and the court concerning the charges against him; and the reasons for his decision to plead guilty, including a desire to avoid a greater penalty that might result from a jury trial.

Blankenship v. State, 858 S.W.2d 897, 904 (Tenn. 1993) (citing Caudill v. Jago, 747 F.2d 1046, 1052 (6th Cir. 1984)). A plea resulting from ignorance, misunderstanding, coercion, inducement, or threats is not "voluntary." Id.

The court accredited the testimony of trial counsel regarding the voluntariness of the petitioner's plea. The court's order also quoted portions of the transcript of the plea submission hearing in which the trial court advised the petitioner of the terms of the plea and of her rights and the petitioner acknowledged her understanding of the plea and her rights and her satisfaction with counsel. The transcript of the plea submission hearing has not been included in the record. Upon review, we hold that the trial court's findings that the petitioner was advised of her rights and the terms of the plea agreement and entered her plea knowingly and voluntarily are supported by the

record. To the extent that the record is deficient in not containing the transcript of the plea submission hearing, we presume that the transcript supports the trial court's findings. See, e.g., State v. Oody, 823 S.W.2d 554, 559 (Tenn. Crim. App. 1991) ("In the absence of an adequate record on appeal, this court must presume that the trial court's rulings were supported by sufficient evidence."). We note, as well, that the petitioner claims that her mental state was such that she was unable to enter a knowing and voluntary plea. At the hearing, she presented only limited evidence of her mental state through her testimony about prescription medications she was taking and of counsel's attempt to have her evaluated for competency to stand trial, and the trial court did not err in denying her claim of involuntary guilty plea on this basis.

The petitioner also claims that the trial court erred in limiting her post-conviction attorney's cross-examination of trial counsel about any legal research trial counsel performed on the petitioner's behalf. She claims without explanation that had she been allowed to pursue this line of questioning, she "would have been able to show that [trial counsel's] failure to properly research relevant issues precluded her from adequately representing the [petitioner]." She has not identified the legal issues which could or should have been researched and how such research would have benefitted her case. Thus, she has not shown that the excluded evidence was relevant. See Tenn. R. Evid. 401. We cannot conclude that the evidence was erroneously excluded.

In consideration of the foregoing and the record as a whole, the judgment of the trial court is affirmed.

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JOSEPH M. TIPTON, PRESIDING JUDGE